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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-740

J. P. STEVENS & CO., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a), adjudging petitioners in civil contempt of two decrees of that court, is reported at 464 F. 2d 1326. The opinions of the court of appeals in the earlier proceedings are reported at 380 F. 2d 292, certiorari denied, 389 U.S. 1005, and 388 F. 2d 896, certiorari denied, 393 U.S. 836. The Board decisions which underly these proceedings are reported at 157 NLRB 869 and 163 NLRB 217.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-60a) was entered on September 13, 1972, and a

petition for rehearing was denied on October 3, 1972. The petition for a writ of certiorari was filed on November 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether clear and convincing evidence supports the findings of the court of appeals that petitioners failed to comply with, and thus were in contempt of, the court's previous decrees.

2. Whether the provisions of the court's decree are appropriate in this civil contempt proceeding to remedy effects of the conduct found to be in contempt of the court's earlier decrees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

STATEMENT

A. The Underlying Decrees

On September 1, 1967, and March 26, 1968, the court of appeals entered opinions[1] sustaining the Board's findings that petitioner (the "Company") had committed "massive violations" of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (Pet. App. 2a).[2] The court's decrees (Pet. App. 6a-10a) in those cases[3] required the Company to cease and desist from discharging or otherwise discriminating against its employees to discourage membership in the Textile Workers Union of America, AFL-CIO (the "Union") or any other labor organization; engaging in surveillance of union organizing activities, or instructing employees to report on the union activities of other employees; interrogating employees concerning union activities; threatening employees with discharge or other reprisals because of their union sympathies or activities; altering employees' working conditions for

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[1] *J. P. Stevens* v. *National Labor Relations Board*, 380 F. 2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005; *J. P. Stevens* v. *National Labor Relations Board*, 388 F. 2d 896 (C.A. 2), certiorari denied, 393 U.S. 836.

[2] The unlawful conduct included the discharge of 71 employees because of union activities, at 20 of the Company's 43 plants in North and South Carolina (380 F. 2d at 295).

[3] These cases are part of a number of unfair labor practice proceedings involving the Company. See, *e.g.*, *J. P. Stevens & Co., Inc.*, 167 NLRB 266, and 169 NLRB 258, enforced with modifications, 406 F. 2d 1017 (C.A. 4); *J. P. Stevens & Co., Inc.* (*Dublin-Nathaniel Plants*), 171 NLRB 1202, enforced, 417 F. 2d 533 (C.A. 5); *J. P. Stevens & Co., Inc., (Gulistan Division)*, 179 NLRB 254, enforced, 441 F. 2d 514 (C.A. 5), certiorari denied, 404 U.S. 830.

the purpose of defeating union organizational efforts; interrogating and intimidating employees concerning their statements to Board agents; encouraging or coercing employees to withdraw from the Union; and "in any other manner" interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

B. The Contempt Proceeding

1. Summary of the court's findings and conclusions

On August 22, 1969, the Board petitioned the court of appeals for an order adjudging the Company and certain of its supervisory personnel in contempt of the above decrees. The court appointed the late District Court Judge Edwin M. Stanley, as Special Master to hear the evidence and make determinations of fact and law on the issues raised (Pet. App. 2a). Extensive hearings involving numerous witnesses were held, resulting in nearly 2500 pages of transcript. After the conclusion of the hearing, but before the parties had filed briefs, Judge Stanley died (Pet. App. 2a-3a). Upon consent of the parties (see the court of appeals' order of January 31, 1972, terminating its reference to the Special Master), and in view of the long period of time that had elapsed since the entry of its decrees, the court of appeals decided to resolve the issues on the record made before Judge Stanley, after receiving briefs and hearing oral argument (Pet. App. 3a).

On July 13, 1972, the court entered its opinion adjudging petitioners in civil contempt for violating the earlier decrees (Pet. App. 1a-6a). The court stated that, "[a]fter making an independent examination of

the entire record, we have adopted only those findings suggested by the Board where we found that the Board had produced clear and convincing evidence in support of its allegations of contemptuous conduct." The court added that, "[w]hile an effort was made to resolve questions of fact by independent evidence, we were, at times, forced to resolve inevitable conflicts in testimony, i.e., the credibility of witnesses. In doing so, we have not considered that mere numerical superiority of witnesses advancing a particular version of the facts forced us to accept their account if we found the opposition's version more internally consistent, externally verifiable, or, on the whole, a far more plausible account of the events in question." (Pet. App. 3a-4a.)

The court concluded (Pet. App. 4a-5a):

> In a continued attempt to dissuade employees from joining the Textile Workers Union of America, the Company and its management personnel in various plants, despite our prior orders, have continued to resort to such unlawful tactics as engaging in surveillance of organizing activities, interrogating employees about their union inclinations, threatening pro-union employees with discharge and other reprisals, discriminatorily altering their working conditions and discharging them because of their union sympathies. In fact, one of the employees so discharged had been illegally terminated before, was reinstated by our prior order, but was then illegally discharged again. * * * In addition, the record here strongly justifies the inference that these respondents deliberately took their chances in ignoring our decrees because they

thought it profitable for them to do so. Finally, while conflicting testimony about a specific event may sometimes have been attributable to difference in perception or recollection, we cannot escape the impression that many conscious and deliberate falsehoods were given by company witnesses. * * * [4]

2. The court's findings and conclusions with respect to employees Whitener, Bowers, and Futrell

Petitioners challenge in particular the court's findings that the Company unlawfully discriminated against employees Whitener, Bowers, and Futrell (Pet. 11-15). Accordingly, we detail below the facts which support those findings:

(a) Gladys Whitener

In February 1969, shortly after the union organizing campaign began at the Longview plant No. 1, in Hickory, North Carolina, Robert Froeber, president of the Stevens Hosiery Division, met with the Company's supervisors and told them that the Union was moving in fast, and that he would "be damned if [this plant is] going to be the first one organized" (Pet. App. 20a-21a; Tr. 758-759, 1117).[5] He added that it was up to the department heads to work closely with the people "to try to defeat the Union," and that "most of the responsibility lay upon the supervisors for the Union getting the firm foothold that it had" (Pet. App. 20a; Tr. 1117, 1125). Froeber also stated that union advocates had to

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[4] The court attached, as an appendix to its opinion, detailed findings of fact and conclusions of law (Pet. App. 6a-54a).

[5] "Tr." references are to the transcript of testimony heard by the late Judge Stanley.

be stopped and could be discharged, so long as union support was not the excuse for the discharge (Pet. App. 20a; Tr. 759, 766, 1118). Thereafter, Plant Manager William Thor met with the supervisors and warned that if the Union were successful they would "have people like the Jones boys and Gladys Whitener telling [them] what to do." He added: "We've got to get rid of these kind of people regardless of what it takes, no matter what it takes * * *" (Pet. App. 20a; Tr. 760).

Gladys Whitener had worked at the plant for four years, prior to her discharge on March 27, 1969 (Pet. App. 21a; Tr. 569). She was a quality checker, which required her to circulate among the some 90 employees whose hosiery production she checked for quality (Pet. App. 21a; Tr. 571-572). Whitener was one of the staunchest union advocates in the plant (Pet. App. 21a; Tr. 783-784, 692-693). After being apprised of her union sympathies, Whitener's supervisor, Harold Abee, constantly followed her around while she worked (Pet. App. 21a-22a; Tr. 581-582, 587-588, 693-694). After Froeber's speech, Abee changed Whitener's job so that she could no longer check the employees' work at their tables, but had to carry it back to her own station for checking (Pet. App. 22a; Tr. 584-586, 630-631, 669-670, 692-693). He also told her not to speak to her fellow employees while she worked (Pet. App. 22a-23a; Tr. 585-588, 669-670, 693, 632, 684-685), although the policy in the plant was to allow on-job conversation, as well as commercial, charitable, and political solicitations during working time (Pet. App. 22a-23a; Tr. 586-588, 607-608, 632-633, 668, 672, 692, 694, 698, 889).

Leonard Duckworth, a supervisor friendly to

Whitener, warned her that the supervisory staff had had "three Gladys meetings already," and added: "Gladys, if you don't stop messing with the union, you are going to get fired" (Pet. App. 24a; Tr. 593). On another occasion, he told her that President Froeber had stated at a supervisor's meeting: "We're going to have to get rid of Gladys Whitener; she is a leader and all the people are following her. * * * And we'll probably have to pay her, but we would be better off to pay her to stay out of the plant than we would be to pay her to come in" (Pet. App. 24a; Tr. 594-596, 612-613, 626).

On the morning of March 26, 1969, Supervisor Abee accused Whitener of threatening to give bad quality reports to people who would not sign union cards (Pet. App. 24a; Tr. 602-603). Whitener denied the charge, but Abee took her to Finishing Superintendent Causby's office, where he left her until he could get witnesses to back up his charge (Pet. App. 25a; Tr. 603-604, 832-835, 837-839, 840-841). Abee returned alone three hours later and informed Whitener that he was still checking and she could go to lunch. After lunch Abee placed Whitener behind his desk where he could watch her. (Pet. App. 25a; Tr. 603-604.) The next morning, Whitener was discharged without ever being told who had accused her (Pet. App. 25a; Res. Exh. 19; Tr. 604-607).

Based on these facts, the court of appeals concluded that the Company harassed Whitener, that at no time had she ever changed the quality report on any employee's work depending on whether he supported the Union, and that she was discharged because of her union adherence and activities (Pet. App. 23a, 25a).

(b) Doris Bowers

Doris Bowers worked for the Company at its Roanoke Rapids plant a total of 14 years, the last 5 as a fringe inspector in the fabricating department (Pet. App. 30a-31a; Tr. 1207-1210). Bowers had no particular problems on the job until she attended a union rally in February 1968. Thereafter, her supervisors ceased being friendly. Moreover, the service boy, Wayne Edmonds, abandoning the old practice of distributing the towels which were difficult to inspect equally among the inspectors, began—with the floorlady's tacit consent—to give the more difficult towels to Bowers (Pet. App. 31a-32a; Tr. 1212-1216.) About this time, Bowers began to wear a union button to work, to the evident disapproval of her supervisors (Pet. App. 32a; Tr. 1216-1218, 1528-1529).

On March 13, 1968, after Bowers complained to Edmonds about his unfair distribution of work, she was called into the office by floorlady Edna Parrish, where Department Supervisor Marshall Cox and Plant Superintendent Tommy Gardner were present. Bowers was cautioned about her inability to get along with the service boy, and warned that a further incident would lead to her discharge (Pet. App. 33a; Tr. 1218-1224.) Gardner gave Bowers a written reprimand which he had prepared before he spoke to her (Pet. App. 33a; Tr. 1464, 1498). Thereafter, Bowers often had to obtain her own towels, because Edmonds would not bring the towels to her and floorlady Parrish made no move to intercede (Pet. App. 34a; Tr. 1225-1226).

On March 19, 1968, Bowers was again given all the difficult towels to inspect (Pet. App. 34a; Tr. 1227-1229,

1252-1256). When she finished, her work was reinspected which was not the usual Company policy (Pet. App. 34a-35a; Tr. 1234-1236). Two reinspectors, floorlady Parrish, supervisor Cox, Superintendent Gardner, and service boy Edmonds all proceeded to look through the towels examining "every corner" (Pet. App. 35a; Tr. 1235). Bowers was then called into the office, where Gardner had a stack of towels which he said Bowers had examined. He showed her only two, containing minor defects. He declared that he had warned her before, that he could not "overlook this thing," and that he had "no choice but to discharge" her. (Pet. App. 35a; Tr. 1230-1231, 1258-1259.)

Based on these facts, the court of appeals found that the Company fired Bowers because of her union adherence and activities (Pet. App. 35a).

(c) Louis Elwood Futrell

Louis Futrell worked for the Company at its Carter plant for about seven years, and since June 1966 had served as a rechecker (Pet. App. 50a; Tr. 2150-2151). Prior to being listed by the Board on December 1, 1969, as a witness in the instant proceeding, which implied that he had given a statement to a Board agent, Futrell had not received any reprimands from the Company (Pet. App. 50a; Tr. 2155). Thereafter, he received written reprimands on January 2, 1970 (Pet. App. 50a-51a; Tr. 2155-2159; Res. Exh. 60); February 17 (Pet. App. 51a; Tr. 2158-2161; Res. Exh. 61); March 10 (Pet. App. 51a; Tr. 2379-2380; Res. Exh. 62); June 3 (Pet. App. 51a; Tr. 2207; Res. Exh. 63); and August 20 (Pet. App. 51a-52a; Tr. 2162-2163; Res. Exh. 64). All were

for minor errors which customarily were not subject to written reprimands (Pet. App. 50a-52a; Tr. 2153-2155, 2203, 2207-2209, 2196, 2163-2169, 2204, 2211, 2214-2216). But, as employee Bronnie Henderson testified (Tr. 2203): "They [the Company] got to where most anything that happened that he [Futrell] done, they would write him up."

On Friday, October 9, 1970, Futrell and two other employees made an error in folding (Pet. App. 52a; Tr. 2170-2173, 2192-2194, 2208-2211, 2470-2474). The following Monday, Futrell was discharged (Pet. App. 52a; Tr. 2171-2177; Res. Exh. 65). Neither of the two other employees was even reprimanded for the error, nor had any employee been written up for such an error in the past (Pet. App. 52a-53a; Tr. 2208-2209, 2210-2211, 2391, 2402).

Based on these facts, the court of appeals found that the Company discharged Futrell because he cooperated with the Board in the instant proceeding by giving it a statement and because he was listed by the Board to be a witness (Pet. App. 53a).

3. The court's order

The court of appeals ordered petitioners to comply with the prior decrees forthwith; to reinstate, with back pay, the unlawfully discharged employees; to post notices in the Company's plants in North and South Carolina advising the employees of the court's adjudication; and to grant the Union access to employee bulletin boards in those plants (Pet. App. 55a-58a). In addition, in the five plants where violations of the decrees occurred, petitioners were ordered to furnish

the Union with a list of the names and addresses of the employees at each plant, and, during a two-year period, to grant the Union access to the plants both for responses to any speeches which the Company might make regarding union representation to its assembled employees, and for organizational speeches should the Board schedule a representation election (Pet. App. 59a). Finally, the court "reserve[d] jurisdiction to assess fines, issue writs of body attachment or take appropriate action against any officer or agent of the Company and against any of the individual respondents responsible for noncompliance with the foregoing provisions of this order and the decrees of this court" (Pet. App. 60a).

ARGUMENT

1. Petitioners' basic argument is that the court of appeals' findings of contempt are not based on clear and convincing proof (Pet. 9-10). Such an issue, turning as it does on an evaluation of the facts of this particular case, does not warrant review by this Court.* See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the court's detailed findings of fact (Pet. App. 10a-53a) covering numerous instances, including the three described

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* The court of appeals could properly make factual and credibility determinations even though it did not have the benefit of a report from the Master, who presided at the hearing. See *National Labor Relations Board* v. *Mackay Radio Co.*, 304 U.S. 333, 350-351; *Utica Mutual Insurance Co.* v. *Vincent*, 375 F. 2d 129 (C.A. 2), certiorari denied, 389 U.S. 839.

above, show that the court's conclusions are supported by clear and convincing evidence.[1]

Petitioners' contention (Pet. 11-15) that their testimonial and documentary evidence "overwhelms" the evidence submitted by the Board is insubstantial. The documentary evidence (Res. Exh. 17) which purportedly proves that Whitener changed a quality report to coerce union support (Pet. 11-12), for example, shows only a change in addition in the report, which could merely reflect the correction of an arithmetic miscalculation. That the change was not a reprisal for failure to support the Union is supported by the fact that the employee involved did not complain of the change to her supervisors when it occurred (Tr. 873-874, 883-886), that Whitener was not accused of misconduct until three weeks later, and that the Company did not

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[1] The court did not uncritically follow the Board's proposed findings, but "adopted only those findings suggested by the Board where [the court] found that the Board had produced clear and convincing evidence in support of its allegations of contemptuous conduct" (Pet. App. 3a). The court rejected the Board's proposed findings of contemptuous conduct at the Company's White Horse plant (Proposed Findings ("P.F.") 23-29); the proposed findings, respecting the Longview plant, of threats and reprisals directed to six union adherents (P.F. 34-35), of unlawful interrogation of an employee regarding the union affiliation of co-workers (P.F. 43-45), of solicitation of employees to spy on their fellow workers (P.F. 56-57), and of harassment of an employee who was to testify for the Board (P.F. 58); the proposed findings, respecting the Roanoke Rapids plant, of interrogation and discharge of one union activist (P.F. 62, 64), of coercion of other employees to cease associating with the activist (P.F. 67), and of surveillance, interrogation, and changing the working conditions of other union sympathisers (P.F. 68, 69, 79-81); and the proposed finding that an employee was not promoted to instructor at the Carter plant because of his union sympathies (P.F. 105).

come forward with the name of any employee who would support the accusation (*supra*, p. 8). Similarly, Superintendent Gardner admitted (Tr. 1517, 1554-1555) that the document (Res. Exh. 35) on which petitioners rely to prove that Bowers did not get an undue amount of difficult towels to inspect (Pet. 13) shows only the type, and not the *number* of loads, of towels inspected on the relevant day. Finally, contrary to petitioners' contention (Pet. 15), witnesses other than Futrell testified to the disparate treatment given him by the Company (*supra*, p. 11; and see, *e.g.*, Tr. 2203-2219, 2391, 2402).

2. Petitioners also err in contending (Pet. 16-18) that the provisions of the contempt decree imposed by the court of appeals are inappropriate in this civil contempt proceeding. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193. The terms of the order here are not unique and are designed to assure compliance with the underlying decrees.

The requirement that the Union be afforded access to Company bulletin boards (Pet. App. 58a), for example, was contained in one of the earlier decrees (388 F. 2d at 905), and has been imposed in other unfair labor practice cases. See, *e.g.*, *Decaturville Sportswear* v. *National Labor Relations Board*, 406 F. 2d 886, 889 (C.A. 6); *National Labor Relations Board* v. *Elson Bottling Co.*, 379 F. 2d 223, 226 (C.A. 6). The requirement that the Company provide employee lists to the Union (Pet. App. 59a) has been imposed in two subsequent unfair labor practice cases involving the Com-

pany. *J.P. Stevens & Co., Inc.* v. *National Labor Relations Board,* 406 F. 2d 1017, 1022-1024 (C.A. 4), and *J.P. Stevens & Co., Inc.* v. *National Labor Relations Board,* 417 F. 2d 533, 540 (C.A. 5). The provision for pre-election speeches by the Union (Pet. App. 39a) has been imposed in another contempt proceeding, where, as here, the Board's initial order proved "insufficient to deter future unlawful conduct." *National Labor Relations Board* v. *Crown Laundry,* 437 F. 2d 290, 294 (C.A. 5). Finally, the requirement that the Company provide facilities for the Union to address the employees concerning organization to the extent that the Company makes similar speeches (Pet. App. 59a) is also recognized as an appropriate unfair labor practice remedy. See, *e.g., Montgomery Ward* v. *National Labor Relations Board,* 339 F. 2d 889, 894 (C.A. 6); *National Labor Relations Board* v. *Elson Bottling Co.,* 379 F. 2d 223, 226-227 (C.A. 6). See also *International Union of Electrical Workers* v. *National Labor Relations Board,* 383 F. 2d 230, 232, n. 4 (C.A. D.C.) (access to company facilities by the union approved even in the absence of company speeches).

Petitioners' assertion (Pet. 20) that "little in modern case law" supports the provision for writs of body attachment in the event of noncompliance (Pet. App. 60a) is similarly without foundation. Such writs are not unusual where—as here—"persistent recalcitrance" in the face of Board orders has occurred. *National Labor Relations Board* v. *Savoy Laundry, Inc.,* 354 F. 2d 78, 81 (C.A. 2). Accord: *National Labor Relations Board* v. *My Store, Inc.,* 68 LRRM 2733, 2734 (C.A. 7), No. 14770, February 23, 1968; *National*

Labor Relations Board v. *Republican Publishing Co.*, 180 F. 2d 437, 441 (C.A. 1); and see *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441-442. Moreover, the use of such writs at this point is conjectural; the court merely reserved the right to use them if the Company does not comply with its orders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

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